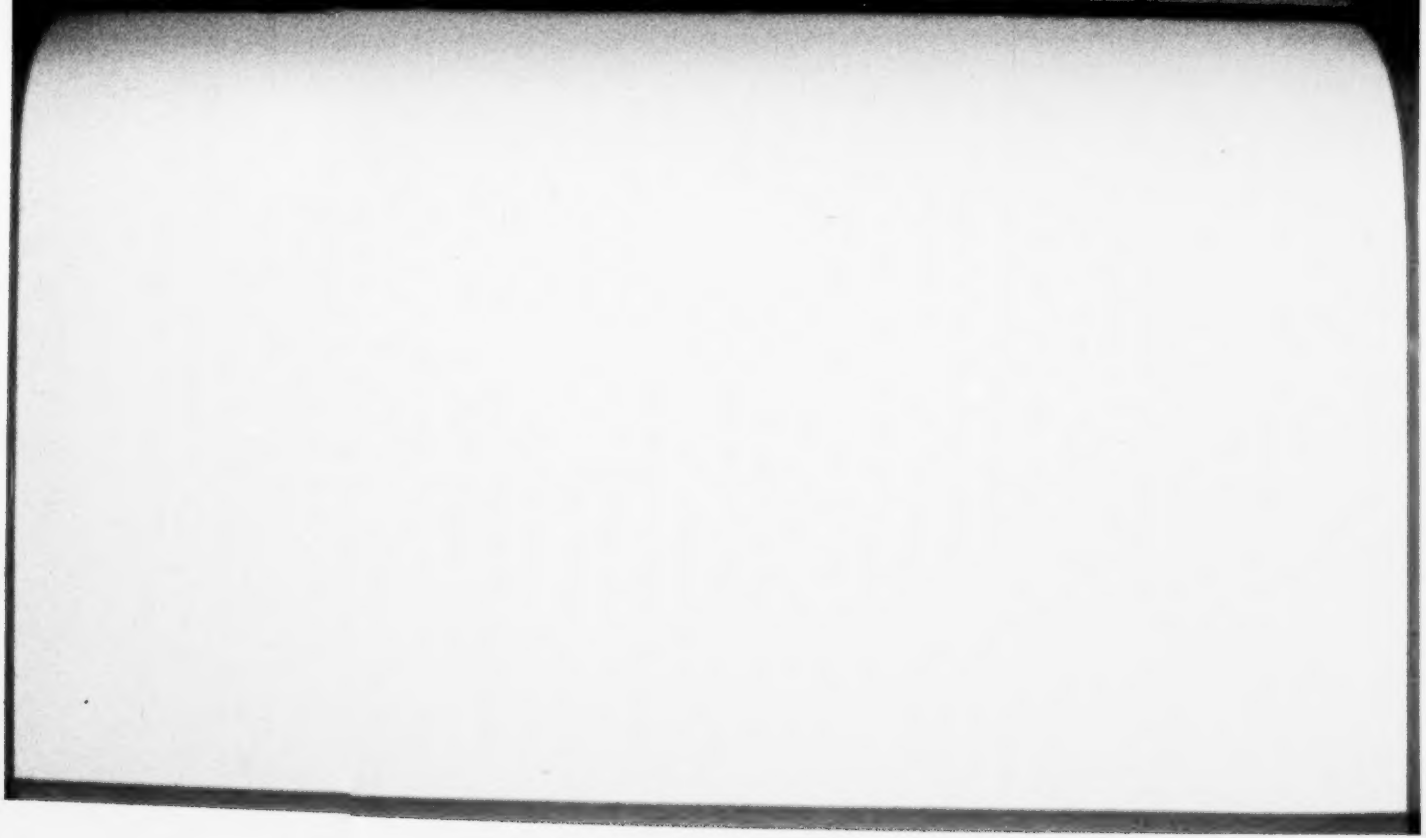

In the Supreme Court of the United States

OCTOBER TERM, 1903.

ROBERT A. CHEESEBOROUGH, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 182.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES ON THE QUESTION OF PEREMPTORY RULING.

[illegible]
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

ROBERT A. CHESEBROUGH, PLAINTIFF IN error,
v.
THE UNITED STATES.
No. 152.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES ON THE QUESTION OF VOLUNTARY PAYMENT.

It was suggested by counsel for the plaintiff in error on the argument, in reply to a question from the bench, that the $600 worth of stamps here in controversy were purchased by the petitioner from the collector of internal revenue for the second district of New York generally—that is, with no particular purpose in view at the time of such purchase. From the record in this case, however, it fairly appears that these particular documentary stamps were purchased by the petitioner from Charles H. Treat, the United States collector of internal revenue for the second district of New York, for the express purpose of affixing the same to the deed of conveyance which he was about to

execute to the Chesebrough Building Company. The allegations in the petition with reference to this matter are as follows:

> And that such law being in force the Chesebrough Building Company, as was known to petitioner, was unwilling to accept the said deed of conveyance unless and until petitioner had placed thereon the stamps required by the aforesaid act, and that petitioner under compulsion of said law, and in order to receive from the purchaser the shares of stock named as the consideration for such conveyance, and in order to entitle such deed to be recorded under the provisions of said act, and to be received as evidence in the Federal courts, as therein provided and in order to enable the petitioner to fulfill his aforesaid contract with said Chesebrough Building Company to make, execute, and deliver to said company a good and sufficient deed of conveyance of said real estate and premises, and in order to give to said company a good and clear title to said real estate and premises, free from doubt, did purchase from Charles H. Treat, the United States collector of internal revenue for the second district of New York, and place upon the said deed of conveyance stamps to the amount of six hundred dollars ($600), the proceeds of sale of which stamps your petitioner believes were thereupon by said collector paid over to the United States as required by law, and said moneys are now held by the United States. (Record, pp. 4 and 5.)

While this allegation of the direct purchase of the stamps from the collector of internal revenue for the specific purpose makes the case more favorable to the contention of the plaintiff in error than it would have been had he purchased the stamps from the collector generally, and for purposes confessedly legal under the law, we think there are, nevertheless, inherent reasons, which we shall briefly point out, why a tax even of this character must be paid under protest or with notice of suit.

NECESSITY FOR PROTEST.

I.

It was suggested upon the argument, by Mr. Justice Brown from the bench, as I recall, that ordinarily the object of requiring a protest or notice of suit was for the purpose of protecting the collector in case suit were instituted against him. This was undoubtedly one of the reasons for requiring a protest, but it seems to me that such reason has ceased to exist by virtue of the provisions contained in section 3220 of the Revised Statutes, which authorizes the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, and "*also to repay any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court*

for any internal taxes collected by him, with the costs and expenses of the suit."

It would seem, therefore, immaterial, so far as the collector is concerned, whether the payment was made under protest or with notice of suit, or made voluntarily, for if a judgment could be recovered against him in either case, he would be protected by the Commissioner under his power to refund to the collector as above provided. In other words, if notice of protest be required *solely* for the protection of the collector, it would seem, in view of the provisions contained in section 3220, to have been rendered unnecessary.

But there is a further question which suggests itself, which is, whether the protest or notice of suit can not be regarded as reasonably necessary for the protection of the Government.

II.

We maintain that protest or notice of suit at the time of payment is necessary, not as a protection to the collector but as a protection to the Government, in order that its officers may know with certainty that the particular money which is sought to be recovered was illegally collected from the taxpayer, and that a record may be made at the time of payment with the officer receiving the money as to the amount paid and the person from whom it was received, so that upon a subsequent appeal to the Commissioner of Internal Revenue he may know with certainty the person

to whom the tax could properly be refunded and paid back, if in his judgment such action were proper.

Such a requirement is surely not a hardship upon the payer of the tax, and besides would serve in many ways as a protection to the Government upon appeal to the Commissioner of Internal Revenue for refund of the tax. In such a case the Commissioner could refer to the official records of the collector's office and find that the amount claimed was actually paid to the United States, and stamps to such amount delivered to the claimant, and if the claimant were the proper person to whom the refund should be made, the Commissioner could act accordingly, whereas if a protest or notice of suit be disregarded a difficult question might arise as to the proper party to whom refund should be made. The law says (section 3220) that the Commissioner of Internal Revenue is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed *or collected*. If, therefore, this tax was legally *collected*, which would have been the case with stamps purchased for many other uses to which they might have been devoted, the collector would not be authorized under the law to remit or refund the same, and it would be impossible for the collector to know, or the Government to be apprised, of the purpose for which the tax was collected, unless some intimation or statement

to that effect were made at the time of the purchase. If the protest is made, however, and an appeal subsequently duly made to the Commissioner of Internal Revenue, it would be a very easy matter for the Commissioner to determine not only whether the tax was illegally collected, but also the party from whom the tax was collected, so that no mistake could be made as to the party who would be entitled to a refund from the Government.

It is easy to conceive that unless this be the law many frauds might be perpetrated upon the Government. Take, for example, this particular case. It may be that the $600 paid to the collector for the purchase of the stamps was as a matter of fact legally collected if at the time of purchasing the same Mr. Chesebrough intended to use them upon other instruments or documents which the law required to be stamped. It is difficult to conceive how any subsequent act on the part of the purchaser could render the collection of the money by the Government illegal which collection was perfectly legal at the time the money was paid. It is true that the petitioner alleges that he bought the stamps in question for this particular purpose, but the Government has no means of knowing that fact, nor can such fact be established or disproved except by the testimony of the purchaser himself. The simple requirement that he pay under protest or with notice of suit and advise the collector of the

purpose for which the stamps were purchased, while such action might be inconvenient, would surely result in no hardship upon the petitioner, and besides it would furnish positive contemporaneous evidence of the illegal character of the collection and assessment, and would likewise protect the Government, upon appeal made to the Commissioner, in making payment to the proper party.

And again, if payment under protest or with notice of suit be required as a condition precedent to maintaining a suit for its recovery, the Government would have the advantage which such notice would afford it in having the defect in the law called to the attention of its officers and an opportunity afforded for a reasonable amendment of the law as a future protection, at least, to its revenues.

III.

Another feature of this case which deserves consideration is the fact that section 25 of the war-revenue act of 1898 provided that collectors could sell and deliver stamps in quantities of not less than $100 of face value, with a discount of 1 per cent. This peculiar provision of the law resulted in people engaging in the business of buying and selling these stamps for profit, and of course resulted in the purchase of large quantities of these stamps from the Government with no particular purpose in mind as to the documents to which they were to be affixed. It would seem

unreasonable to say that a person purchasing stamps from a broker could subsequently claim the right to maintain a suit against the Government upon making an application to the Commissioner for a refundment upon the ground that the tax had been illegally assessed or collected by the United States.

It will also be noticed that section 3220, Revised Statutes, authorizes the Commissioner to refund and pay back all taxes erroneously or illegally *assessed or collected*. From the very nature of the tax under consideration it is not a tax that could be *assessed* by the collector, and if, as has already been pointed out, a party purchases stamps from the collector for a confessedly legal object the tax would be "legally collected," and the purchaser could not render the collection illegal by subsequently using the stamps for an object alleged to be illegal.

The plaintiff in error in this case elected to voluntarily pay the tax, and for the reason heretofore pointed out he should not now be permitted to maintain this suit. If he considered the law invalid at the time of the collection of the tax, the Government furnished him with ample means for properly raising that question by paying the tax under protest or with notice of suit, and then bringing an action to recover it back, either against the collector or the Government. If he failed to take such action, two other methods were open to

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him:—first, to pay the tax voluntarily and take his chances of securing a refund at the pleasure of the Government; second, to refuse to stamp the instrument, and subsequently raise the constitutionality of the law in either a civil or a criminal case, in which such point could properly be presented to the court for determination.

Respectfully submitted.

MILTON D. PURDY,
Assistant Attorney-General.

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